Supreme Court, U.S.
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No. 95-933

In The

Supreme Court of the United States

October Term, 1995

WESLEY KEAT,

Petitioner,

v.

MARIA DE LA LUZ CHAVEZ, et al.,

Respondent.

Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Two

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THE RECORD CLEARLY FRAMES THE FOURTH AMENDMENT ISSUE PRESENTED – WHETHER A POLICE OFFICER MAY BE HELD LIABLE FOR USE OF FORCE DURING THE COURSE OF AN ILLEGAL SEARCH, EVEN THOUGH A JURY HAS FOUND THAT THE FORCE USED WAS REASONABLE UNDER *GRAHAM V. CONNOR*, 490 U.S. 386 (1989) AND JUSTIFIED SELF-DEFENSE UNDER APPLICABLE TORT PRINCIPLES.

Two tactics are evident in Respondents' Brief in Opposition to Keat's Petition for Certiorari. The first is to ignore the plain holding of the Court of Appeal's opinion that Keat may be held liable for Crescencio Chavez, Senior's death because Keat's illegal entry was a "remote," "but for" proximate cause of the death, notwithstanding the jury's finding that Keat's use of force was reasonable under *Graham v. Connor*, 490 U.S. 386. (Pet. for Cert., App. pp. 6-9.) The second tactic is to accuse Keat of distorting the record in hopes that even if the Court correctly perceives the legal issue presented to be compelling and warranting review, nonetheless it may be reluctant to grant certiorari based on its impression that the factual record is muddy and hence the issue may not be properly framed. The Court should not be misled by respondents' efforts.

First, simply ignoring the Court of Appeal's unsupported and troublesome holding does not make it disappear nor eliminate its devastating impact on the heretofore settled rules governing use of force by police officers. Here, liability has been imposed on a police officer for use of force during the course of a search and

arrest despite a jury's finding that the force was reasonable under the totality of the circumstances standard of *Graham* and in fact justified self-defense under standard tort principles. Thus, under the holding in this case, in making a split-second decision on whether to utilize force, an officer must focus not simply on the circumstances and, indeed, specific threat directly before him, but on the entire chain of conduct leading up to the situation – an inquiry that may jeopardize the lives of police officers and innocent bystanders as well.

Second, there has been no distortion of the record by Keat. As a threshold matter, as noted above, the Court of Appeal's opinion clearly frames the use of force issue as one of proximate causation, i.e., the illegal entry as a "remote," "but for" cause of Mr. Chavez's death, with no discussion of any of the facts respondents now urge as a basis for supporting the judgment.

Morover, respondents' arguments and characterization of the record simply underscore what is going on here – an unsuccessful excessive force claim is being shoehorned into an illegal entry claim. Thus, while respondents admit the jury found Keat liable based upon his illegal entry, they tellingly attempt to support the judgment by relying on an interpretation of the record that focuses squarely on the use of force inquiry, i.e., *whether Keat presented "an unlawful violent threat against the homeowner or the homeowner's family," so as to have justified Mr. Chavez's use of force against him.* (Respondents' Brief in Opposition ("RBIO"), p. 8.) Indeed, respondents assert "the evidence clearly established, and the jury obviously found, that petitioner *did* present such an unlawful and

violent threat." (*Id.*; emphasis in original.) This is completely contrary to the record.

It is respondents who are asking this Court to ignore the specific findings of the jury, i.e., that Deputy Keat lawfully used force to protect himself and his partner under *Graham v. Connor*. All of the facts set forth at pages 5-6 of Respondents' Brief in Opposition could have supported a verdict in favor of plaintiffs on the excessive force claim. The problem for respondents is that the jury, in making its finding that Keat *reasonably* used force to defend himself under *Graham*, clearly rejected any notion that Keat himself or his partner, Ammar, presented an unlawful threat to Mr. Chavez or the other members of the Chavez family. Respondents assert the jury made no finding that Mr. Chavez's use of a gun was "illegal or wrongful in any way." (RBIO, p. 4.) But the jury's verdict cannot be rationally construed any other way. Keat's sole defense to the excessive force and wrongful death claims was justified self-defense, while respondents' justification for Mr. Chavez's attack was protection of himself and his family. A jury could not conclude that Deputy Keat reasonably used force against Mr. Chavez while at the same time somehow concluding that Keat and Ammar were unlawfully assaulting and endangering other family members.

Respondents' Brief in Opposition also contains two inaccurate assertions with respect to the record in this case. First, respondents correctly note that two witnesses at trial testified that Mr. Chavez shot at the ceiling during the melee and thus assert that this somehow supports the jury's finding Keat should be liable for Mr. Chavez's death based upon the illegal entry. (RBIO, p. 6.) As a

threshold matter, these facts again go to the propriety of the use of force by Keat against Mr. Chavez under the standard articulated in *Graham*, and if anything underscore the inconsistency in the jury's verdict. If, as respondents assert, the jury believed that Mr. Chavez simply fired at the ceiling and did not reasonably present a threat to the officers, why then did it find that the officers reasonably believed that Mr. Chavez was shooting at them? The reality is, as noted in the petition and ignored by respondents, that the jury was presented with two diametrically opposed stories of what occurred – Keat and Ammar testifying that Mr. Chavez fired at them (with Keat saying a bullet whizzed passed his head and Deputy Ammar receiving a bullet hole in his arm) and respondents asserting Mr. Chavez merely fired at the ceiling. Quite simply, the jury could not have believed respondents' version of these facts and exonerated Keat and Ammar from liability under *Graham*. In addition, although two witnesses testified that at one point Mr. Chavez fired at the ceiling, they did not indicate that he did not at some other point fire at the two officers.

Second, respondents assert that the trial court judge found it necessary to write the California Supreme Court concerning various factual misstatements purportedly made by petitioner in seeking review. (RBIO, p. 3.) This is nothing more than mudslinging, and inaccurate mudslinging at that. The misstatement referred to in the trial judge's letter was not made by counsel for petitioner Keat, but by counsel for the County of Riverside, which was not a party to the appeal. Hence, any purported inaccuracy in a letter written by that party to the

Supreme Court cannot be attributed to Keat. More critically, and conspicuously, the trial judge's letter does not suggest that Keat or anyone else made any sort of omission or misstatement with respect to the facts surrounding Keat's use of force, i.e., whether he did or did not present a threat to the Chavez family, or whether Mr. Chavez could reasonably believe he did so. Rather, the factual inaccuracy raised in Judge Bishop's letter concerns the lawfulness of the entry, i.e., whether a domestic disturbance call was canceled before Keat arrived and is hence irrelevant to the use of force issue presented here. (See RBIO, pp. 2a-3a.) Once again, respondents' argument appears to be nothing more than a calculated effort to blur the record in an attempt to make this case an unattractive one for review.

The plain truth is that having been denied recovery on their excessive force claims, respondents' seek to resurrect them in the context of an illegal entry claim. The problem remains as set forth in the petition for certiorari: A police officer has been found liable for damages arising from the use of force during the course of a search and detention, notwithstanding the fact that a jury expressly found that the use of force was reasonable under the totality of circumstances test of *Graham v. Connor*. This rule of "but for" liability arising from the legal entry has created uncertainty in an area of the law in which clear and firm standards may quite literally be a matter of life or death. It is therefore necessary for this Court to grant certiorari to resolve this critical issue.

II.

RESPONDENTS MISAPPREHEND PETITIONER'S DUE PROCESS ARGUMENT AND PRESENT NO VALID ARGUMENT IN OPPOSITION TO REVIEW OF THIS ISSUE.

In his petition Keat argued that requiring a defendant to present evidence of financial condition in order to avoid an unconstitutionally destructive punitive damage award violates due process. (Pet., pp. 22-29.) Respondents do not even attempt to address this argument. Respondents instead appear to be addressing an argument raised by Keat in the California Supreme Court, but not presented here, i.e., whether a federal claim brought in California state court is subject to California law requiring a plaintiff to produce evidence of a defendant's financial condition in order to sustain a punitive damage award as required by *Adams v. Murakami*, 54 Cal. 3d 105, 813 P.2d 1348, 284 Cal. Rptr. 318 (1991). Respondents also appear to be addressing some sort of self-invented argument concerning the standards for imposing punitive damages. (See RBIO, pp. 12-13 [noting that "state courts that have addressed the availability of punitive damages in section 1983 cases have followed federal standards on the definition of punitive damages" and that the punitive damage instruction in the case "is virtually verbatim from the United States Supreme Court's decision in *Smith v. Wade*, 461 U.S. 30, 51 (1983)"].)

Keat submits that respondents have presented no argument with respect to the critical due process issue raised in this case because they have no response. As detailed in the petition for certiorari, there are grave due process problems with the system utilized by the federal

courts and the majority of states to impose punitive damages on a defendant: Placing the burden of proof on a defendant to avoid an unconstitutionally destructively punitive damage award. Given the widespread application of this rule and its flaws under the Due Process Clause, review is amply warranted.[1]

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[1] At the risk of getting into a "battle of footnotes," petitioner must point out a flat misstatement of California law in respondents' brief in opposition. In his petition for certiorari, Keat observed by way of footnote that the California Court of Appeal had twice seemingly taken him to task for not presenting evidence of his financial condition post-verdict in the context of a motion for new trial. The court apparently recognized that this was irrelevant to Keat's contention that the Due Process Clause barred imposing such a requirement on him, but nonetheless Keat noted that the court of appeal's suggestion that such evidence could be presented by way of new trial motion was inconsistent with California statutory law. (Pet. for Cert., p. 23, fn. 5, citing Calif. Code Civ. Proc. § 658.) Citing *Lovett v. Dintzer*, 131 Cal. App. 2d 165, 280 P.2d 58 (1955), respondents assert that "evidence as to amount of damages may be considered anew by the trial judge in ruling on a motion for new trial." (RBIO, p. 13, fn. 2.) However, *Lovett* merely holds that the trial judge may consider the evidence presented *at trial* anew and in no way suggests that the court may review post-trial declarations in determining whether a verdict is excessive. As noted above, California Code of Civil Procedure section 658 clearly forecloses presentation of such evidence by way of a motion for new trial for excessive damages. Respondents also assert that "[t]here are likewise no restrictions when presenting a motion for judgment notwithstanding the verdict (as was done in this case) pursuant to California Code of Civil Procedure § 659." (RBIO, p. 13, fn. 2.) The problem is, of course, that an argument that damages are excessive pertains to the defendant's right to a *new trial*, not judgment in his or her favor on a punitive damage claim. In sum, if Keat proved that the punitive

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for certiorari should be granted.

Dated: January 17, 1996

Respectfully submitted,

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damage award vastly exceeded his net worth and was hence unconstitutionally destructive, his remedy would be a new trial, not judgment in his favor on the punitive damage claim. Thus, Keat would have no legal basis to introduce evidence of his financial condition for purposes of a motion for judgment notwithstanding the verdict. Keat's due process argument for judgment is based upon his contention that due process requires that plaintiff bear the burden of proof on the issue of financial condition and that there has been a failure of proof on the issue here, thus requiring judgment in his favor on the punitive damage claim.